

No. 10171

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26

United States
Circuit Court of Appeals

For the Ninth Circuit.

ELIZABETH H. FISHER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of the Record

Upon Petition to Review a Decision of the United
States Board of Tax Appeals

FILED

JUL 29 1942

PAUL P. O'BRIEN,

CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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APPEARANCES

For Taxpayer:

F. T. RITTER, C.P.A.

For Comm'r.:

SAMUEL TAYLOR, Esq.

Docket No. 98637

ELIZABETH H. FISHER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

1939

May 20—Petition received and filed. Taxpayer notified. Fee paid.

“ 22—Copy of petition served on General Counsel.

Jul. 12—Answer filed by General Counsel.

“ 12—Request for circuit hearing in Los Angeles, Calif. filed by General Counsel.

“ 24—Notice issued placing proceeding on Los Angeles calendar. Answer and request served.

Oct. 17—Hearing set Dec. 4, 1939 in Los Angeles, Calif.

Dec. 4—Hearing had before Mr. Smith on merits. Submitted. Stipulation of facts filed. Briefs due 1/2/40—replies 1/25/40.

“ 28—Brief filed by General Counsel.

“ 30—Brief filed by taxpayer. 1/2/40 copy served.

1940

Apr. 9—Motion to cite the case of Guggenheim v. Rasquin filed by General Counsel. 5/7/40 granted.

Aug. 7—Motion to cite the case of Commissioner vs. Powers, C.C.A. 1st. and United States vs. Ryerson, C.C.A. 7th filed by General Counsel. 8/8/40 granted.

1941

Mar. 15—Memorandum findings of fact and opinion rendered, Smith, Div. 5. Decision will be entered under Rule 50. 3/17/41 copy served.

Apr. 15—Motion to vacate and set aside report, for rehearing and for leave to file amended answer, amended answer lodged, filed by General Counsel.

“ 23—Order that memorandum findings of fact and opinion entered 3/15/41 be set aside and held at naught; amended answer lodged 4/15/41 be filed this date and restoring proceeding to the general calendar for hearing on the merits, entered.

1941

Apr. 28—Hearing set May 26, 1941 in Los Angeles, Calif.

Jun. 6—Hearing had before Miss Harron. Petitioner granted leave to file reply—resubmitted. Respondent's brief due 7/1/41. Petitioner's 7/15/41—reply 7/30/41.

“ 6—Reply to amended answer filed by taxpayer. 6/16/41 copy served.

“ 20—Transcript of hearing of June 6, 1941, filed.

Jul. 1—Brief filed by General Counsel.

“ 15—Brief filed by taxpayer. 7/15/41 copy served.

Oct. 9—Motion to cite William H. Taylor case, C. C. A. 3rd Circuit, in support of respondent's brief filed by General Counsel.

“ 10—Motion granted.

Dec. 9—Findings of fact and opinion rendered, Smith. Decision will be entered under Rule 50. 12/9/41 copy served. [1*]

1942

Jan. 5—Agreed motion to incorporate into the record stipulation of facts attached hereto, filed.

“ 8—Order supplementing findings of fact promulgated 12/9/41 entered.

“ 27—Computation of deficiency filed by General Counsel.

“ 29—Hearing set Feb. 25, 1942 on settlement.

* Page numbering appearing at top of page of original Certified Transcript of Record.

1942

- Feb. 16—Consent to settlement filed by taxpayer.
 “ 18—Decision entered, Smith, Div. 5.
 May 7—Petition for review by U. S. Circuit Court
 of Appeals, 9th Circuit, filed by taxpayer.
 “ 8—Proof of service filed by taxpayer.
 “ 27—Designation of contents of record filed by
 taxpayer.
 “ 28—Proof of service filed. [2]

United States Board of Tax Appeals

Docket No. 98637

ELIZABETH H. FISHER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (MT-ET-GT-33-35-37-6th California) dated February 25, 1939, and as a basis of her proceeding alleges as follows:

1. The petitioner is an individual with office at 1117 Bankers Building, Los Angeles, California. The returns for the period here involved were filed with the Collector for the Sixth District of California.

2. The notice of deficiency (a copy of which is attached hereto and marked Exhibit A) was mailed to the petitioner on February 25, 1939.

3. The taxes in controversy are gift taxes for the calendar years 1933, 1935, and 1937, and in approximately the following amounts: [3]

1933—	\$ 138.72
1935—	64.56
1937—	2465.20
	<hr/>
Total—	\$2668.48

4. The determination of tax set forth in said notice is based on the following errors:

1933

I. Respondent erred in including in petitioner's taxable gifts for 1933 the excess of the cost of certain single premium life insurance policies over the value of said policies as of the date of gift, as follows:

	Value Jan. 20, 1933	Premium Cost
Item 1. Policy No. 1,736,- 388, Penn Mutual Life Ins. Co.	\$17,371.75	\$19,442.00
Item 2. Policy No. 784,- 844, Connecticut Mu- tual Life Ins. Co.....	36,763.50	38,565.50
	<hr/>	<hr/>
	\$54,135.25	\$58,007.50
Excess over value at date of gift included by Re- spondent	\$ 3,872.25	
	<hr/>	

1935

II. Respondent erred in including in petitioner's "total amount of net gifts for preced-

ing years" the sum of \$3872.25, as follows: [4]

Total amount of net gifts for preceding years per Respondent.....	\$43,007.50
Total amount of net gifts for preceding years per Petitioner's return.....	39,135.25
	<hr/>
Difference	\$ 3,872.25

The deficiency letter does not disclose the exact source of the above difference but presumably it arises from the change in valuation by Respondent of the insurance policies donated by petitioner in 1933.

1937

III. Respondent erred in including in Petitioner's "total amount of net gifts for preceding years" the sum of \$3,872.25, as follows:

Total amount of net gifts for preceding years per Respondent.....	\$58,007.50
Total amount of net gifts for preceding years per petitioner's return.....	54,135.25
	<hr/>
Difference	\$ 3,872.25

The deficiency letter does not disclose the exact source of the above difference but presumably it arises from the change in valuation by Respondent of the insurance policies donated by Petitioner in 1933.

IV. Respondent erred in including in Petitioner's taxable gifts for 1937 certain gifts in trust, aggregating \$29,662.49, the beneficiaries of the trust being six grandchildren, as disclosed in the [5] trustee's information return, Form 710.

V. Alternatively, if petitioner is held to have made taxable gifts in trust, aggregating \$29,662.49 or any other sum, to her six grandchildren, during the year 1937, then respondent erred in failing to allow an exclusion for each of said grandchildren of \$5,000.00, or an aggregate exclusion of \$30,000.00 for the year 1937, in respect to such gifts.

5. The facts upon which petitioner relies as the basis of this proceeding are as follows:

ISSUES I, II and III.

(a) On January 20, 1933, petitioner made an assignment of the following fully-paid single-premium life insurance policies,

Policy No. 1,736,388, of Penn Mutual Ins. Co.

Policy No. 784,844 of Connecticut Mutual Life Ins. Co.

to her three children as set forth in the copy of the gift filed with petitioner's return. As of the date of gift the cash surrender values of the policies were \$17,371.75 and \$36,763.50 respectively, and such values were returned by the petitioner in her gift tax return for 1933.

(b) Respondent has erroneously increased the value of said policies by using the cost of said policies to petitioner, \$19,442.00 and \$38,565.50, respectively, and has overstated her net gifts for 1933 accordingly. [6]

(c) Respondent has erroneously carried forward

in the year 1935 as "Net gifts for preceding years" the overstatement arising in the year 1933 in respect to the value of the insurance policies which were the subject of the gifts in the year 1933, and has assessed her gifts in the year 1935 at excessive rates as a consequence.

(d) Respondent has erroneously carried forward in the year 1937 as "Net gifts for preceding years" the overstatement arising in the year 1933 in respect to the value of the insurance policies which were the subject of the gifts in the year 1933, and has assessed her gifts in the year 1937 at excessive rates as a consequence.

ISSUE IV.

(e) On September 9, 1937, petitioner gave to the following persons (her grandchildren) in trust, public utility bonds having a value of \$29,662.49.

Dana B. Fisher

Wayne H. Fisher, Jr.

Richard A. Yerge

Robert F. Oxnam

Phillip H. Oxnam

Betty Ruth Oxnam

Inasmuch as the petitioner is allowed an exclusion of \$5,000.00 for the year 1937 for each donee the aforementioned gifts were not returned by petitioner in the year 1937.

(f) Respondent has erroneously determined that the aforementioned public utility bonds were return-

able by petitioner in the year 1937, and has overstated her total [7] gifts for the year 1937 by \$29,662.49 accordingly.

ISSUE V.

(g) Respondent has allowed an exclusion of only \$5,000.00 in the year 1937 in respect to the gifts in trust to petitioner's six grandchildren. If it is held that petitioner should return the value of said gifts to her six grandchildren, then petitioner is entitled to an exclusion of \$5,000.00 for each of said six grandchildren, or an aggregate exclusion of \$30,000.00 in respect to such gifts.

WHEREFORE, the petitioner prays that this Board may hear the proceeding and determine that petitioner owes no deficiencies for the years 1933, 1935, and 1937.

F. T. RITTER

607 Jergins Trust Building
Long Beach, California

Counsel for Petitioner. [8]

(Duly verified.) [9]

POWER OF ATTORNEY
GENERAL

Know All Men by These Presents:

That Elizabeth H. Fisher of the City of Los Angeles, County of Los Angeles, State of California, has made, constituted, and appointed, and by these presents does make, constitute and appoint Wayne

H. Fisher her true and lawful Attorney for her and in her name, place and stead, and for her use and benefit, to ask, demand, sue for, recover, collect, and receive all such sums of money, debts, dues, accounts, legacies, bequests, interests, dividends, annuities and demands whatsoever as are now or shall hereafter become due, owing, payable or belonging to her, and have, use and take all lawful ways and means in her name or otherwise for the recovery thereof, by attachments, arrests, distress, or otherwise, and to compromise and agree for the same, and acquittances or other sufficient discharges for the same, for her and in her name, to make, seal, and deliver; to bargain, contract, agree for, purchase, receive, and take lands, tenements, hereditaments, and accept the seizing and possession of all lands, and all deeds and other assurances, in the law therefor and to lease, let, demise, bargain, sell, remise, release, convey, mortgage and hypothecate lands, tenements, and hereditaments, upon such terms and conditions, and under such covenants as he shall think fit. Also to bargain and agree for, buy, sell, mortgage, hypothecate, and in any and every way and manner deal in and with goods, wares, and merchandise, choses in action, and other property in possession or in action, and to make, do and transact all and every kind of business of what nature or kind soever, and also for her and in her name, and as her act and deed, to sign, seal, execute, deliver and acknowledge such deeds, leases and assignments of leases, covenants, indentures, agreements, mortgages, hypothecate

cations, bottomries, charter-parties, bills of lading, bills, bonds, notes, receipts, evidences of debt, releases and satisfaction of mortgage, judgment and other debts, and such other instruments in writing of whatever kind and nature as may be necessary or proper in the premises.

Giving and Granting unto her said Attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises as fully to all intents and purposes as she might or could do if personally present, hereby ratifying all that her said Attorney shall lawfully do or cause to be done by virtue of these presents.

In Witness Whereof, she has hereunto set her hand and seal the 7th day of June nineteen hundred and twenty-seven.

[Seal] (Signed) ELIZABETH H. FISHER

Signed, Sealed and Delivered in the Presence of
(Sgd.) BETTY W. YATES

State of California

County of Los Angeles—ss.

On this 17th day of June A. D., 1927, before me a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared Elizabeth H. Fisher known to me to be the person whose name is subscribed to the within Instrument, and acknowledged to me that she executed the same.

In Witness Whereof, I have hereunto set my hand

and affixed my official seal the day and year in this certificate first above written.

(Sgd.) STELLA C. BARTHOLOMEW
Notary Public in and for said
County and State.

My commission expires February 26, 1929.

I have examined the original instrument and do hereby certify that this is a true, exact and complete copy of said instrument.

LOUIS A. AUDET
Notary Public in and for said
County and State.

My commission expires May 6, 1943. [10]

cc--F. T. Ritter, Attorney
607 Jergins Trust Building
Long Beach, California.

EXHIBIT A

February 25, 1939

MT-ET-GT-676-33-35-37-6th California

Donor—Elizabeth H. Fisher

Mrs. Elizabeth H. Fisher,

1117 Bankers Building,

Los Angeles, California.

Madam:

You are advised that the determination of your

gift tax liability for the calendar years 1933, 1935, and 1937 discloses a deficiency of \$2,668.48 (\$138.72 for 1933, \$64.56 for 1935, and \$2,465.20 for 1937), as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetyth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed forms and forward them to this office. The signing and filing of these forms will expedite the closing of your returns by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the forms, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,
Commissioner.

By: (signed) D. S. BLISS
Deputy Commissioner.

Enclosures:

Statement

Waivers

GLD R [11]

MT-ET-CT-676-33-35-37-6th California
Donor—Elizabeth H. Fisher

STATEMENT

1933

	Returned	Determined
Total gifts 1933.....	54,135.25	58,007.50
Less exclusion	15,000.00	15,000.00
	<hr/>	<hr/>
Amount included	39,135.25	43,007.50
Less specific exemption.....	0.00	0.00
	<hr/>	<hr/>
Net gifts	39,135.25	43,007.50
Tax on net gifts.....	724.06	862.78
Tax shown on return.....		724.06
		<hr/>
Deficiency		138.72

SCHEDULE A

Item 1	17,371.75	19,442.00
Item 2	36,763.50	38,565.50

1935

Total gifts, 1935	30,000.00	30,000.00
Less exclusions	15,000.00	15,000.00
	<hr/>	<hr/>
Amount included	15,000.00	15,000.00
Less specific exemption.....	0.00	0.00
	<hr/>	<hr/>
Net gifts, 1935.....	15,000.00	15,000.00
Net gifts for preceding years	39,135.25	43,007.50
	<hr/>	<hr/>
Total net gifts.....	54,135.25	58,007.50
Tax on total net gifts.....	1,342.10	1,545.39
Tax on net gifts for preced- ing years	723.05	862.78
	<hr/>	<hr/>
Tax on net gifts, 1935.....	618.05	682.61
Tax assessed on return.....		618.05
		<hr/>
Deficiency		64.56

2—Donor—Elizabeth H. Fisher

STATEMENT (Continued)

1937

	Returned	Determined
Total gifts, 1937.....	\$76,368.33	\$106,364.17
Less exclusions	35,000.00	40,000.00
	<hr/>	<hr/>
Amount included	41,368.33	66,364.17
Less Specific exemption.....	40,000.00	40,000.00
	<hr/>	<hr/>
Net gifts 1937.....	1,368.33	26,364.17
Net gifts preceding years.....	54,135.25	58,007.50
	<hr/>	<hr/>
Total net gifts.....	55,503.58	84,371.67
Tax on total net gifts.....	2,745.32	5,559.03
Tax on net gifts for preced- ing years	2,633.17	2,970.68
	<hr/>	<hr/>
Tax on net gifts, 1937.....	123.15	2,588.35
Tax assessed on return.....		123.15
		<hr/>
Deficiency		2,465.20

SCHEDULE A

Item 10	9,275.00	9,412.50
Item 11	9,000.00	9,050.00
Item 12	7,000.00	7,150.00
Item 16	1,258.34	1,354.19
Total value of securities placed in trust as shown on the trustee's information return, Form 710.....	0.00	29,662.49
Exclusions	35,000.00	40,000.00

[Endorsed]: Filed May 20, 1939. [13]

United States Board of Tax Appeals

[Title of Cause.]

ANSWER

Comes now the respondent, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed in the above entitled proceeding, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Admits the allegations contained in paragraph 2 of the petition.

3. Admits the allegations contained in paragraph 3 of the petition.

4. I to V, inclusive. Denies the allegations of error contained in subparagraphs I to V, inclusive, of paragraph 4 of the petition.

5. (a) Denies so much of subdivision (a) of paragraph 5 of the petition as alleges that as of the date of gift the cash surrender values of the policies were \$17,371.75 and \$36,763.50, and admits all other allegations therein contained. [14]

(b) Denies so much of subdivision (b) of paragraph 5 of the petition as alleges that the respondent erroneously increased the value of the policies and also denies that the respondent overstated the net gifts of the donor for 1933, and admits all other allegations therein contained.

(c) Denies so much of subdivision (c) of paragraph 5 of the petition as alleges that the respondent erroneously carried forward into the year 1935 net

gifts for preceding years, and also denies that the respondent's action with respect to the gifts in 1933 constituted an overstatement, and also denies that the respondent has assessed the donor's gifts in the year 1935 at excessive rates, and admits all other allegations therein contained.

(d) Denies so much of subdivision (d) of paragraph 5 of the petition as alleges that the respondent erroneously carried forward into the year 1937 the net gifts for preceding years, and also denies that the respondent's action with respect to the gifts for 1933 constitutes an overstatement of the amount of the gifts for 1933, and also denies that the respondent has assessed the donor's gifts in the year 1937 at excessive rates, and admits all other allegations therein contained.

(e) Denies so much of subdivision (e) of paragraph 5 of the petition as alleges that the gifts were of public utility bonds, and admits all other allegations therein contained. [15]

(f) Denies so much of subdivision (f) of paragraph 5 of the petition as alleges that the respondent erroneously determined that the value of the securities were subject to the gift tax, and also denies that the respondent overstated the donor's total gifts for the year 1937 by the sum of \$29,662.49, and admits all other allegations therein contained.

(g) Denies the allegations contained in subdivision (g) of paragraph 5 of the petition.

6. Denies generally and specifically each and

every allegation contained in the petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that the petition be denied and that the respondent's determination be in all respects approved.

(Signed) J. P. WENCHEL,

FTH

Chief Counsel,

Bureau of Internal Revenue.

Of Counsel:

ALVA C. BAIRD,

FRANK T. HORNER,

Special Attorneys,

Bureau of Internal Revenue.

FTH/W 7/639/39.

[Endorsed]: Filed Jul. 12, 1939. [16]

[Title of Board and Cause.]

AMENDED ANSWER

Comes now the respondent, Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed in the above-entitled proceeding, admits, denies and avers as follows:

1, 2. Admits the allegations contained in paragraphs 1 and 2 of the petition.

3. Admits that the taxes in controversy are gift taxes for the calendar years 1933, 1935 and 1937 but

denies all other allegations contained in said paragraph 3 of the petition.

4. I to V inclusive. Denies the allegations of error contained in subparagraphs I to V inclusive, of paragraph 4 of the petition.

5. (a) Admits the allegations contained in subparagraph (a) of paragraph 5 of the petition.

(b), (c), (d). Denies the allegations contained in subparagraphs (b), (c), and (d) of the petition.

(e) Denies so much of sub-paragraph (e) of paragraph 5 of the petition as alleges that the petitioner is allowed an exclusion of \$5,000 for the year 1937 for each donee. Admits all other allegations contained in subparagraph (e) of paragraph 5 of the petition.

(f) Denies the allegations contained in subparagraph (f) [17] of paragraph 5 of the petition.

(g) Admits so much of subparagraph (g) of paragraph 5 of the petition as alleges that the respondent has allowed an exclusion of only \$5,000 in the year 1937 in respect to the gifts in trust to petitioner's six grandchildren. Denies all other allegations contained in subparagraph (g) of paragraph 5 of the petition.

6. Denies generally and specifically each and every allegation contained in the petition not hereinbefore admitted, qualified or denied.

Further answering the petition, the respondent avers as follows:

7. In the deficiency notice, copy of which is attached to the petition, the respondent allowed one \$5,000 exclusion with respect to the gifts made by

the petitioner under trust agreement dated September 9, 1937.

8. The said gifts in trust were gifts of future interests for which no exclusions are allowable under Section 504 (b) of the Revenue Act of 1932.

Wherefore, it is respectfully prayed that petitioner's net gifts for 1937 be increased from \$26,364.17, as shown in the deficiency notice, to \$31,364.17; that the deficiency be [18] increased accordingly and that the amount of such increase be left for determination under Rule 50. The respondent hereby asserts claim for said increase of deficiency as the statute in such case specifically provided.

(Signed)

J. P. WENCHEL

AHF

Chief Counsel,

Bureau of Internal Revenue.

Of Counsel:

LEWIS S. PENDLETON,

Special Attorney,

Bureau of Internal Revenue.

LSP/bj/ 4/14/41

[Endorsed]: Filed April 23, 1941. [19]

[Title of Board and Cause.]

REPLY

Comes now the petitioner, Elizabeth H. Fisher, by her attorney, F. T. Ritter, and replying to the

allegations contained in paragraphs (7) and (8) of respondent's amended answer, admits and denies as follows:

7. Admits the allegations contained in paragraph (7) of the amended answer.

8. Denies the allegations contained in paragraph (8) of the amended answer.

Wherefore, the petitioner prays that the Board determine that petitioner is entitled to an exclusion of \$5,000.00 in respect of gifts during the year 1937 for each of said six grandchildren, or an aggregate of \$30,000.00, and that petitioner owes no deficiency in respect to such gifts in the year 1937.

F. T. RITTER,
607 Jergins Trust Bldg.,
Long Beach, California
Counsel for Petitioner.

[Endorsed]: Filed June 6, 1941. [20]

[Title of Board and Cause.]

MEMORANDUM FINDINGS OF FACT
AND OPINION

Smith: This is a proceeding for the redetermination of gift taxes for the years 1933, 1935, and 1937 as follows:

1933	\$138.72
1935	64.56
1937	2,465.20

The issues presented for decision are——

(1) Should an irrevocable gift of paid-up single premium life insurance policies on the life of the donor in the year 1933 be valued and assessed at the cash surrender value of the policies at the time of the gift or upon the cost of the policies to the donor? [21]

(2) Is the donor entitled to an exclusion of not to exceed \$5,000 for each individual named beneficiary of a trust when making a gift in trust during the year 1937 (total exclusions \$29,662.49) or to but one exclusion of not to exceed \$5,000?

FINDINGS OF FACT.

The petitioner is a resident of Los Angeles, California. She filed gift tax returns for the years 1933, 1935, and 1937 with the collector at Los Angeles.

On January 10, 1933, petitioner purchased Policy No. 784844 of the Connecticut Mutual Life Insurance Co. of Hartford, Conn., paying therefor on said date a single premium of \$38,565.50. The terms of the policy are that the insurance company, upon proof of the death of the insured, will pay \$50,000 in accordance with the terms of an interest income agreement of the date of the policy or, if such agreement should terminate, to the insured's executors, administrators, or assigns (subject to the rights of the insured to change any beneficiary or mode of settlement). The cash or loan value of the policy on the date of the issuance, January 10, 1933, and on the date of the gift, January 20, 1933, was \$36,-

763.50. The surrender value of the policy increases annually and after the policy has been in effect for five years is \$38,836.50.

On January 11, 1933, the petitioner purchased Policy No. 1736388 of the Penn Mutual Life Insurance Co., paying therefor on said date a single premium of \$19,442. By the terms of this policy the insurance company upon proof of the death of the insured agrees to pay to the beneficiary, the right being reserved by the insured to change the beneficiary, \$25,000. The cash or loan [22] value of the policy on January 11, 1933, the date of issuance, and on January 20, 1933, the date of the gift, was \$17,371.75. The cash surrender value of the policy increases annually and after it has been in effect for six years is \$19,670.50.

On January 20, 1933, the petitioner entered into a trust indenture by which she assigned all of her rights to the policies to a trustee. The trustee is to pay the proceeds of the policy and any dividends received thereon in accordance with the terms of the trust.

In her gift tax return for 1933 the petitioner included these policies at their cash or loan values as of the date of the gift. The respondent determined that they should be included at their costs, namely, the amounts of premiums paid, and issued his notice of deficiency accordingly.

The deficiency determined for 1936 arises solely from the determination of the net gifts for preceding years, that is, whether the policies should be

included at their cash surrender values at the date of the gift or at the amounts paid for the policies by the petitioner.

The value of the two insurance policies donated by the petitioner in 1933 is the amounts paid for them by the petitioner.

On September 9, 1937, the petitioner created a trust and delivered to the trustee bonds of an agreed fair market value of \$29,662.49. The trust was irrevocable and the petitioner assigned to the trustee all of her right, title and interest in and to the said bonds. The trust agreement provided that the income of the bonds should be paid to six named beneficiaries and [23] that upon the termination of the trust the proceeds should likewise be divided.

In her gift tax return for 1937 the petitioner, proceeding on the theory that six gifts were made through the trust agreement and that she was entitled to six exclusions of \$5,000 each (not exceeding \$29,662.49), did not include said sum of \$29,662.49 in her gift tax return for the calendar year 1937. The respondent determined that there was but one gift, the gift to the trust, and that the petitioner was entitled to but one exclusion of \$5,000. He also determined that the net gifts for preceding years should be based upon the costs of the two policies given away in 1933 and not on their cash surrender values.

The petitioner is entitled to six exclusions of \$5,000 each (not exceeding \$29,662.49) upon her gifts made to the trustee in 1937.

OPINION.

The first question presented by this proceeding is whether the two paid-up single premium life insurance policies on the life of the donor should be valued at the cost of the policies to the donor, as determined by the respondent, or upon their cash surrender values at the date of the gift. This issue is decided in favor of the respondent upon the basis of *Guggenheim v. Rasquin*, U. S., decided February 3, 1941.

The second question is whether the petitioner is entitled to six exclusions not exceeding in the aggregate \$29,662.49, or to one exclusion of \$5,000. This issue is decided in favor of the petitioner upon the authority of *Commissioner v. Hutchings*. U. S., decided March 3, 1941.

[Seal]

Decision will be entered under Rule 50.

[Endorsed]: Entered Mar. 15, 1941. [24]

FINDINGS OF FACT AND OPINION OF DEC. 9, 1941

[Title of Board and Cause.]

Docket No. 98637. Promulgated December 9, 1941.

1. The value for gift tax purposes of single premium life insurance policies on the donor's

life which the donor transferred as a gift in trust, held, the cost of the policies to the donor. *Guggenheim v. Rasquin*, 312 U. S. 254.

2. In 1937 petitioner conveyed to a trustee, irrevocably, certain bonds for the benefit of her grandchildren. The net income of the trust was to be distributed annually on December 20 to the beneficiaries (or to their parents or guardians until they were 21 years of age) until they attained the age of 25 years, when their proportional interests in the trust corpus were to be distributed to them free of trust. If any grandchild should die without issue his share of income and corpus was to go to the surviving grandchildren of their issue. Held, as to the corpus of the trust, the gifts were limited to commerce in use, possession, or enjoyment at some future date and were therefore gifts of future interests with respect to which no exclusion is allowable under section 504 (b) of the Revenue Act of 1932. *United States v. Pelzer*, 312 U. S. 399. Held, further, that as to the income of the trust, there were gifts of present interests in the trust fund to each of the living grandchildren and that the donor is entitled to an exclusion, not to exceed \$5,000 with respect to each of such gifts.

F. T. Ritter, C. P. A., for the petitioner.

Samuel Taylor, Esq., for the respondent.

This is a proceeding for the redetermination of

gift taxes for the years 1933, 1935, and 1937 as follows:

1933	\$138.72
1935	64.56
1937	2,465.20

The issues presented for decision are:

(1) Whether, for gift tax purposes, two paid-up single premium life insurance policies on the life of the donor, purchased by the donor in the year 1933, should be valued at the cash surrender value of the policies at the time of the gift or at the cost of the policies to the donor. [25]

(2) Is the donor entitled to an exclusion of not to exceed \$5,000 for each individually named beneficiary of a trust when making a gift in trust during the year 1937 (total exclusions \$29,662.49), or to but one exclusion of not to exceed \$5,000?

By an amended answer the respondent seeks to increase the deficiency determined for 1937 upon the ground that the gift of the trust established in 1937 was of "future interests" and that he erred in allowing an exclusion of \$5,000 in respect of the gift to the trust.

FINDINGS OF FACT.

Petitioner is a resident of Los Angeles, California. She filed gift tax returns for the years 1933, 1935, and 1937 with the collector at Los Angeles.

On January 10, 1933, petitioner purchased Policy

No. 784844 of the Connecticut Mutual Life Insurance Co. of Hartford, Connecticut, paying therefor on said date a single premium of \$38,565.50. The terms of the policy are that the insurance company, upon proof of the death of the insured, will pay \$50,000 in accordance with the terms of an interest income agreement as of the date of the policy, or, if such agreement should terminate, to the insured's executors, administrators, or assigns (subject to the rights of the insured to change any beneficiary or mode of settlement). The cash or loan value of the policy on the date of the issuance, January 10, 1933, and on the date of the gift, January 20, 1933, was \$36,763.50.

On January 11, 1933, the petitioner purchased Policy No. 1736388 of the Penn Mutual Life Insurance Co., paying therefor on said date a single premium of \$19,442. By the terms of this policy the insurance company upon proof of the death of the insured agrees to pay \$25,000 to the beneficiary, the right being reserved by the insured to change the beneficiary. The cash or loan value of the policy on January 11, 1933, the date of issuance, and on January 20, 1933, the date of the gift, was \$17,371.75.

On January 20, 1933, the petitioner conveyed all of her rights in the policies to a trustee in trust for the benefit of her three adult children.

In her gift tax return for 1933 the petitioner included these policies at their cash or loan values as of the date of the gift. The respondent determined that they should be included at their costs, namely,

the amounts of premiums paid, and issued his notice of deficiency accordingly.

The deficiency for 1935 arises solely from the respondent's determination of the net gifts for preceding years. In such determination he included the policies in question at the amounts paid [26] for them by the petitioner rather than at their cash surrender values at the date of the gift.

The values of the policies for gift tax purposes are the amounts paid for them by the petitioner.

On September 9, 1937, the petitioner created a trust for the benefit of her six grandchildren and delivered to the trustee bonds of an agreed fair market value of \$29,662.49. The trusts were declared irrevocable and the petitioner assigned to the trustee all of her right, title, and interest in and to the bonds.

The trust indenture provided in part as follows:

Second: The Trustee shall from the gross income received from said Trust Estate pay all taxes that may accrue against the Trust property or the income arising therefrom and all proper and necessary expenses of said Trust and the management thereof.

Third: The net income arising from said Trust Estate shall be disposed of by the Trustee as follows:

On or about the 20th day of December of each year the net income accumulated during said year up to the said time shall be distributed to the beneficiaries who have attained the age of twenty-one (21) years, and if under twenty-one years then to

the herein designated parent of such beneficiary for his or her use and benefit, in proportion to the share of each therein as herein provided until he or she reaches the age of twenty-five (25) years, at which time his or her share in the corpus of said Trust fund, together with any accumulated and undistributed income therefrom shall be delivered to the beneficiary arriving at such age free and clear of any control by the Trustee as his or her own property.

Fourth: The beneficiaries of this Trust are:

Dana B. Fisher and Wayne H. Fisher, Jr.
sons of Wayne H. Fisher;

Robert F. Oxnam, Philip H. Oxnam and
Betty Ruth Oxnam, children of Ruth Fisher
Oxnam; and

Richard A. Yerge, son of Rachel Fisher Fay-
ram.

Fifth: As to each beneficiary this Trust, subject to the provisions in paragraph "Sixth" thereof shall continue until he or she shall have attained the age of twenty-five (25) years, whereupon this Trust, as to such beneficiary so attaining said age, shall cease and determine and his share of the corpus of the Trust Estate, to-wit, one-sixth (1/6th) thereof together with one-sixth (1/6th) of any accumulated or undistributed income which may be in the hands of the Trustee at such time, shall go to and be delivered to such beneficiary so attaining the age of twenty-five (25) years.

Sixth: Should either or any of said beneficiaries named in this Trust die prior to the termination of said Trust as to him or her, leaving issue, then the corpus and income that such deceased beneficiary would have received had such beneficiary lived, shall go to and vest in the issue of said deceased beneficiary by right of representation and as to whom said Trust shall be deemed terminated by his or her death; and should either or any of said beneficiaries die prior to the termination of this Trust, as to him or her, without issue, then the share or interest that such beneficiary would have received, if living, shall go to and vest in equal shares in the surviving beneficiaries and to the children of any deceased beneficiary, if any, by right of representation. [27]

It was expressly provided in the trust agreement that none of the beneficiaries was to have any right to alienate any part of the income or corpus of the trust.

In her gift tax return for 1937 the petitioner, proceeding on the theory that six gifts were made through the trust agreement and that she was entitled to six exclusions not exceeding in the aggregate \$29,662.49, did not include said sum of \$29,662.49 in the total of the gifts made. The respondent determined that there was but one gift, the gift to the trust, and that the petitioner was entitled to but one exclusion of \$5,000. By his amended answer the respondent claims that he erred in his allowance of the exclusion of \$5,000 upon the ground that the

gifts in trust were gifts of future interests, and accordingly asks for an increase in the deficiency arising from such alleged error.

OPINION.

Smith: The first question presented by this proceeding is whether the two paid-up single premium life insurance policies on the life of the donor should be valued for gift tax purposes at the cost of the policies to the donor, as determined by the respondent, or at their cash surrender values at the date of the gift, as contended by the petitioner. This issue is decided in favor of the respondent upon authority of *Guggenheim v. Rasquin*, 312 U. S. 254.

The second question is what exclusions, if any, the petitioner is entitled to in respect of the trust which she created for the benefit of her six grandchildren in 1937. In the determination of the deficiency for that year the respondent allowed an exclusion of \$5,000, upon the theory that a single gift had been made to the trustee.

The respondent now contends that he erred in allowing an exclusion of \$5,000 (upon authority of *Helvering v. Hutchings*, 312 U. S. 393); that the gifts to the grandchildren were gifts of "future interests" within the meaning of section 504 (b) of the Revenue Act of 1932 as construed by the United States Supreme Court in *United States v. Pelzer*, 312 U. S. 399, and *Ryerson v. United States*, 312 U. S. 405; and that petitioner is not entitled to any exclusions in respect of such gifts. Section 504 (b) reads in part as follows:

* * * In the case of gifts (other than of future interests in property) made to any person by the donor during the calendar year, the first \$5,000 of such gifts * * * shall not * * * be included in the total amount of gifts made during such year.

In article 11 of Regulations 79 (1936 Edition) "future interests" are said to include:

* * * reversions, remainders, and other interests or estates, whether vested or contingent, and whether or not supported by a particular interest or [28] estate, which are limited to commence in use, possession, or enjoyment at some future date or time.
* * *

The above provisions of the regulations were given approval by the Supreme Court in *United States v. Pelzer*, supra. In that case there were gifts in trust to the donor's 8 living grandchildren and for any other grandchildren later to be born. The trustee was to accumulate the income for 10 years and thereafter pay it to the living grandchildren as they attained the age of 21 years in equal shares for life. There were provisions for gifts over of any deceased grandchild's share of distributable income. The trust was to continue for 21 years after the death of the last survivor of the named grandchildren, when the corpus and accumulated income were to be distributed to the surviving grandchildren (both named and unnamed), or the heirs of any deceased grandchild per stirpes. The Court held that the gifts made under the trust agreement were gifts of future interests within the

meaning of section 504 (b) above. Quoting from the committee reports recommending the enactment of section 504 (b) and from the Commissioner's regulations referred to above, the Court in its opinion said:

We think that the regulations, so far as they are applicable to the present gifts, are within the competence of the Commissioner in interpreting § 504 (b) and effect its purpose as declared by the reports of the Congressional committees, and that the gifts to the eight beneficiaries of the 1932 trust were gifts of future interests which are excluded from the benefits of that section. Here the beneficiaries had no right to the present enjoyment of the corpus or of the income and unless they survive the ten-year period they will never receive any part of either. The "use, possession or enjoyment" of each donee is thus postponed to the happening of a future uncertain event. The gift thus involved the difficulties of determining the "number of eventual donees and the value of their respective gifts" which it was the purpose of the statute to avoid.

The principal distinction between the instant case and the Pelzer case is that here the distribution of the trust income to the donees was to commence immediately within the year of the creation of the trust, rather than 10 years later, as in the Pelzer case. In other words, upon the creation of the trust each grandchild received an immediate right to a proportional share of the income from the \$29,662.49 trust fund for a definite number of years, depend-

ing on his or her age at the date of the gift. We think that this right to receive such income was a gift of a present rather than a future interest.

In the Pelzer case the Court pointed out that the beneficiaries there had no right to the present enjoyment of the corpus or the income and would never receive any of the income or the corpus unless they survived the 10-year period. The beneficiaries here had the right to the present enjoyment of the income. This right was to continue until each beneficiary should attain the age of 25 years. [29]

In *J. Willis Gardner*, 41 B. T. A. 679, there was a gift in trust, the income to be paid to the beneficiary for 25 years or for life, whichever was the shorter period, when the corpus also was to be paid to the beneficiary if still living. We held, sustaining the Commissioner's determination, that the exclusions to which the donor was entitled on account of the gift were limited to the present value of the right of the beneficiary to receive the income of the trust for a period of 25 years. As to the corpus, we held that the gift was of a future interest.

Likewise, in *Leopold E. Block*, 41 B. T. A. 830, the gift of the income of a trust fund for life was held to be a gift of a present interest, in respect of which the donor was entitled to a \$5,000 exclusion. See also *Edith Pulitzer Moore*, 40 B. T. A. 1019.

Here, we think that there were gifts to the six grandchildren of a present interest in the income of the trust. The amount of each of such gifts was the present worth of the right to receive one-sixth

of the income of the trust fund of \$29,662.49 for the period during which it was to be paid to the donee.

We think that under the decision of the Supreme Court in the Pelzer case the gifts of the remainder interests, that is, the corpus of the trust, were gifts of future interests. The receipt of these gifts by the beneficiaries of the trust was contingent upon their attaining the age of 25 years. If any grandchild should die before that time, without issue, his or her share was to go to the survivors or their issue. There was no certainty whether, or to what extent, any of the beneficiaries would take upon final distribution of the corpus of the trust.

The respondent makes the argument that the gifts to the beneficiaries were gifts of "future interests" because the beneficiaries would receive no distribution until December 20 of each year. The argument of the respondent appears to be that since the income of the trust to be collected by the trustee was not to be paid over to the beneficiaries until December 20, the beneficiaries did not have the "use, possession, or enjoyment" of the income from the date of the creation of the trust. Under this interpretation of the law a gift to the beneficiary of a trust would necessarily be of a future interest unless the beneficiary had the right to demand from the trustee his share of the income of the trust as it was received, month by month, or day by day.

We do not think that this is a correct interpretation of the statute. We think that where the trust

instrument provides that the income of the trust shall be distributed to the beneficiary annually or oftener the gift of the income is not a gift of a future interest.

Reviewed by the Board.

[Seal] Decision will be entered under Rule 50. [30]

United States Board of Tax Appeals

Washington

Docket No. 98637

ELIZABETH H. FISHER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the findings of fact and opinion of the Board promulgated December 9, 1941, the respondent herein on January 27, 1942 having filed a recomputation of tax and the petitioner on February 16, 1942 having filed an agreement to such recomputation, now, therefore, it is

Ordered and Decided: That there are deficiencies in gift tax for the calendar years 1933, 1935 and 1937 in the respective amounts of \$138.72, \$64.56 and \$2,283.28.

[Seal] (Signed) CHARLES P. SMITH,

Member.

[Endorsed]: Entered Feb. 18, 1942. [31]

[Title of Board and Cause.]

MOTION TO VACATE AND SET ASIDE REPORT, FOR REHEARING, AND FOR LEAVE TO FILE AMENDED ANSWER.

Comes now the Commissioner of Internal Revenue, the respondent herein, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and moves that the Board (1) vacate and set aside its report entered herein on March 15, 1941; (2) grant a rehearing; and (3) permit the respondent to file the attached amended answer claiming an increase of deficiency. As grounds for his motion the respondent represents as follows:

In its memorandum opinion of March 15, 1941 the Board held that the gifts made by the petitioner under the trust agreement of September 9th, 1937, were gifts to the beneficiaries rather than to the trust as a separate entity, and that one exclusion should be allowed for each of the six beneficiaries.

On March 3, 1941, the Supreme Court handed down decisions in the cases of Commissioner vs. Hutchings, .. U. S.....; United States vs. Pelzer ..U. S.....; and Ryerson vs. United States (No. 495) .. U. S. These cases hold that where transfers are made in [32] trust one \$5,000.00 exclusion should be allowed for each beneficiary, provided the gifts are not gifts of future interests. In the Pelzer case, the Supreme Court upheld the validity of the gift tax regulations (art. 11 of Regs. 79 (1933

Ed. and also 1936 Ed.)) which define a future interest as any interest or estate whether vested or contingent, which is limited to commence in use, possession or enjoyment at some future date or time. The Supreme Court also held in that case that where the use, possession or enjoyment of the donee is postponed until the happening of a future uncertain event, the gifts are of future interests in property, within the meaning of section 504 (b) of the Revenue Act of 1932.

Under the terms of the trust agreement of September 9, 1937, the trustee was directed to accumulate the income until on or about the 20th day of December of each year and then to distribute it among such of the settler's grandchildren who had attained the age of 21 years, or to the designated parent of such of the settler's grandchildren who had not attained the age of 21 years, for their use and benefit. The trust was to terminate as to each grandchild upon attaining the age of 25 years, whereupon the trustee was to deliver his or her share of the principal and accumulated income to respective grandchildren. The trust further provided that should any of the beneficiaries die before termination of the trust leaving issue, then the corpus and income should go to such beneficiary's issue by right of [33] representation, but if either or any of them should die without issue prior to the termination of the trust, then his or her share should go to the surviving beneficiaries or to the children or any deceased beneficiary by right of representation.

It will be seen from the foregoing that the beneficiaries' possession and enjoyment of both income and principal were dependent upon future contingencies. Accordingly the gifts made to them involve the difficulties of determining the number of eventual donees and the value of their respective gifts, which the Supreme Court has said "it was the purpose of the statute to avoid."

In view of the above circumstances the Board under its power and duty "to do full justice to the parties while they are still before it", and in order to correct an error which would otherwise justify an appeal, should vacate its report and grant the parties a rehearing. *Commissioner v. Edison Securities Corporation*, (C.C.A. 4th, 1935) 78 F. (2d) 85; *John Thomas Smith*, (1940) 42 B.T.A.—No. 78; *Hormel v. Helvering*, (March 17, 1941) — U.S. —; and *Helvering v. Richter*, (March 17, 1941) — U.S. —. Furthermore, in order "to promote the ends of justice", the Board should grant the respondent's motion for rehearing in order to permit the filing of an amended answer claiming an increase of deficiency on account of the erroneous allowance of one \$5,000.00 exclusion with respect to the trust agreement of September 9, 1937. *Hormel v. Helvering*, *supra*. It is immaterial that the respondent has changed his theory of the [34] case as the result of the intervening decisions of the Supreme Court. Cf. *Milton Rubinstein*, (1940) 41 B.T.A. 220, in which the Board overruled a long line of its prior decisions with respect to the issue here involved, on account of the intervening decisions of the circuit courts.

In the event that the Board, after consideration of the matters set forth herein, is not satisfied that the motion should be granted, it is respectfully requested and moved that it be set down for oral argument before a division of the Board sitting at Washington, D. C.

Wherefore, it is respectfully prayed that this motion be granted.

(Signed) J. P. WENCHEL

AHF

Chief Counsel, Bureau of Internal Revenue.

Of Counsel:

LEWIS S. PENDLETON,

Special Attorney, Bureau of Internal Revenue.

[Endorsed]: Apr 15, 1941 [35]

[Title of Board and Cause.]

ORDER RESTORING PROCEEDING TO
GENERAL CALENDAR

On April 15, 1941, the respondent filed a motion to vacate and set aside the Memorandum Findings of Fact and Opinion entered in the above-entitled proceeding on March 15, 1941, and for rehearing, and for leave to file an amended answer by reason of the opinions of the Supreme Court handed down March

3, 1941, in the cases of *Helvering v. Hutchings*, — U.S. —, *United States v. Pelzer*, — U.S. —, and *Ryerson v. United States*, — U.S. —. The premises considered, it is

Ordered that the Memorandum Findings of Fact and Opinion entered March 15, 1941, be and the same is hereby set aside and held at naught. It is further

Ordered that the amended answer lodged with this Board on April 15, 1941, be filed as of this date. It is further

Ordered that the proceeding be restored to the General Calendar for hearing on the merits.

[Seal] (Signed) CHARLES P. SMITH
Member.

Dated, April 23, 1941.

CPS:oh [36]

[Title of Board and Cause.]

STIPULATION OF FACTS

It is hereby stipulated by and between the petitioner, Elizabeth H. Fisher, and the Commissioner of Internal Revenue, by their respective attorneys, that the following facts shall be taken as true, provided, however, that this stipulation shall be without prejudice to the right of either party to introduce other and further evidence not at variance with the facts herein stipulated: [37]

10. On September 9, 1937, petitioner entered into a trust agreement, a copy of which is attached hereto and incorporated [38] herein as Exhibit D. Simultaneously with the execution of said trust agreement, petitioner delivered to the trustee named therein the assets described therein, having a fair market value of \$29,662.49.

11. The petitioner, proceeding on the theory that six gifts were made through said trust agreement and that she was entitled to six exclusions (not exceeding the sum of \$29,662.49), did not include said sum of \$29,662.49 in her gift tax return for the calendar year 1937. The Commissioner determined that there was but one gift, a gift to the trust, and that petitioner was entitled to but one exclusion.

12. Nothing in this stipulation contained shall be deemed to preclude either party hereto from contesting by appropriate action any decision of the Board of Tax Appeals with respect to any of the issues herein involved.

(Signed) F. T. RITTER
Counsel for Petitioner

(Signed) J. P. WENCHEL
FTH
Chief Counsel, Bureau of
Internal Revenue,
Counsel for Respondent.

ST:E 11/22/39

[Endorsed]: Filed Dec. 4, 1939 [39]

EXHIBIT D

Trust Agreement

This Trust Agreement made and entered into this 9th day of September, 1937, by and between Elizabeth H. Fisher, of the County of Los Angeles, State of California, hereinafter called Trustor, and Wayne H. Fisher, of the County of Los Angeles, State of California, hereinafter called Trustee,

Witnesseth:

Trustee admits, certifies and declares that he has received from Elizabeth H. Fisher, Trustor, by assignment, transfer and delivery to him the following personal property, to-wit:

\$10,000 par value Cities Service Co. 5% bonds due April 1, 1958, the value of which at this date is \$7,000.00;

\$10,000 par value Consolidated Gas Utilities Company 6% bonds, due June 1, 1943, the value of which at this date is \$7,850.00;

\$10,000 General Public Utility Co. 6½% bonds due April 1, 1956, the value of which at this date is \$8,300.00;

\$10,000 Indiana Service Co. 5% bonds due January 1, 1950, the value of which at this date is \$6,400.00;

making a total of Twenty Nine Thousand, Five Hundred and Fifty Dollars, (\$29,550.00). The said personal property so assigned, transferred and delivered to Trustee by Elizabeth H. Fisher, Trustor, is in-

tended to and does constitute and is hereinafter referred to as the Trust Estate.

Said Trustor agrees that the property so contributed in the creation of said Trust Estate shall hereafter remain and constitute the Trust Estate and that she, the Trustor, shall not have any right, title, estate or interest in or to the said property constituting the said Trust Estate, or [40] income therefrom, nor shall she have the power to alter, change, amend or revoke this Trust declaration and said Trustor declares that this Trust is not made in contemplation of death but is intended to and shall be an irrevocable trust, given by the said Trustor, absolutely, for the purpose of creating an estate for the beneficiaries named herein separate and apart from that of the Trustor and independent of the hazards that may be incident to the accumulation, creation and preservation in any estate of the Trustor and of assuring as far as possible to the beneficiaries herein named, the beneficial use of the income therefrom until this Trust as herein provided terminates as to him or her and the preservation of the principal for distribution to him or her at the time herein provided for and otherwise for his or her general welfare.

It is understood and agreed that no consideration is given by the Trustee for the transfer and delivery to him of said Trust Estate and that the same has been received and accepted and will hereafter be administered in Trust with the powers and for the

uses, purposes and benefits hereinabove and hereinafter set out and subject to the following conditions:

First: The said Trustor authorizes the said Trustee to retain the said Trust property to form and constitute the corpus of this Trust, and said Trustee shall in no event be personally liable for any depreciation in value of said Trust property, it being the express wish of said Trustor that said Trustee shall retain the Trust Property as delivered by the Trustor to him until he, in his judgment and discretion, deems it to the best interest of the beneficiaries to sell and reinvest the proceeds of said sale, he being given full [41] authority in his judgment and discretion from time to time to sell any of the assets constituting the corpus of the Trust and reinvest the same and to sell and dispose of as he may deem best, any right or rights which shall accrue to said Trustee as an incident to the ownership of any stock or bonds constituting the Trust Estate.

Second: The Trustee shall from the gross income received from said Trust Estate pay all taxes that may accrue against the Trust property or the income arising therefrom and all proper and necessary expenses of said Trust and the management thereof.

Third: The net income arising from said Trust Estate shall be disposed of by the Trustee as follows:

On or about the 20th day of December of each year the net income accumulated during said year up to said time shall be distributed to the beneficiaries who have attained the age of twenty-one (21)

years, and if under twenty-one years then to the herein designated parent of such beneficiary for his or her use and benefit, in proportion to the share of each therein as herein provided until he or she reaches the age of twenty-five (25) years, at which time his or her share in the corpus of said Trust fund, together with any accumulated and undistributed income therefrom shall be delivered to the beneficiary arriving at such age free and clear of any control by the Trustee as his or her own property.

Fourth: The beneficiaries of this Trust are:

Dana B. Fisher and Wayne H. Fisher, Jr. sons of Wayne H. Fisher; [42]

Robert F. Oxnam, Philip H. Oxnam and Betty Ruth Oxnam, children of Ruth Fisher Oxnam; and

Richard A. Yerge, son of Rachel Fisher Fayram.

Fifth: As to each beneficiary this Trust, subject to the provisions in paragraph "Sixth" thereof, shall continue until he or she shall have attained the age of twenty-five (25) years, whereupon this Trust, as to such beneficiary so attaining said age, shall cease and determine and his share of the corpus of the Trust Estate, to-wit, one-sixth ($1/6$ th) thereof together with one-sixth ($1/6$ th) of any accumulated or undistributed income which may be in the hands of the Trustee at such time, shall go to and be delivered to such beneficiary so attaining the age of twenty-five (25) years.

Sixth: Should either or any of said beneficiaries named in this Trust die prior to the termination of said Trust as to him or her, leaving issue, then the corpus and income that such deceased beneficiary would have received had such beneficiary lived, shall go to and vest in the issue of said deceased beneficiary by right of representation and as to whom said Trust shall be deemed terminated by his or her death; and should either or any of said beneficiaries die prior to the termination of this Trust, as to him or her, without issue, then the share or interest that such beneficiary would have received, if living, shall go to and vest in equal shares in the surviving beneficiaries and to the children of any deceased beneficiary, if any, by right of representation. [43]

Seventh: No beneficiary of this Trust shall be vested with the right, power or authority to sell, pledge, mortgage or in any other manner to encumber, anticipate or impair his or her beneficial or legal interest in the Trust or any part of the corpus thereof, and no part of the income or principal of the Trust Estate shall be subject to the claims of any creditor of the beneficiaries or either of them, or liable to attachment or execution or any other process of law and each distribution of income or principal of said Trust shall be made only to or on behalf of said beneficiaries, and each of them, as herein provided.

Eighth: The Trustor, except as to any limitations by said Trustee herein specifically set forth, and par-

ticularly except as to the time of distribution of income and corpus does by this agreement endow and vest said Trustee with sole discretion upon any matters in connection with the handling and management of said Trust Estate, and in his judgment and discretion to invest and reinvest the same and in all such matters his action shall be final and conclusive, the Trustor reposing full faith and confidence in the judgment and discretion of said Trustee.

Ninth: The Trusts herein created shall be irrevocable as to the said Trustor.

Tenth: The Trustor at any time may add to this Trust and the corpus thereof, other property, which, upon acceptance thereof by the Trustee, shall become a part of the Trust Estate to be held in Trust, managed, invested, re-invested and disposed of under and subject to this Trust Agreement and to each and all and every one of the terms, conditions and [44] provisions thereof.

Eleventh: In the event of the death of the Trustee herein named, Wayne H. Fisher, or of his legal incapacity or inability for any reason to act as Trustee, the Trustor appoints as successor to said Wayne H. Fisher, her daughter, Rachel Fisher Fayram, and in the event of her death or legal incapacity or inability for any reason to act as Trustee, the Trustor appoints as trustee hereunder her daughter, Ruth Fisher Oxnam.

Twelfth: The Trustor directs that no bond of any kind or character shall be required of the said

Wayne H. Fisher, or of his said sucesors or either of them, acting in his or her capacity as such Trustee, either by said beneficiaries or any other person or authority.

Thirteenth: Said Wayne H. Fisher herein named as Trustee and each of the persons designated as possible successors to him in such capacity shall, in order to qualify as Trustee, sign and attach to this Trust Agreement a written acceptance of the terms and conditions hereof and of his or her election to act as Trustee, together with a receipt of said Trust property which may be received by him or her.

In Witness Whereof the Trustor has hereunto set her hand the day and year first above written.

(Signed) ELIZABETH H. FISHER

Witness:

(Signed) E. T. McMAHAN [46]

I, Wayne H. Fisher, Trustee named in the foregoing Trust Agreement do hereby acknowledge that I have received the same and I hereby accept the appointment of Trustee thereunder and under the Trust thereby created and agree to perform the terms and conditions of said Trust Agreement according to the best of my ability.

I further acknowledge that I have received as the corpus of the Trust Estate, all the Trust Property herein specified and set forth and I agree to hold said Trust Property and any other received by

me hereunder in the capacity of such Trustee under and in accordance with said Trust Agreement and not otherwise.

Witness my hand and seal this tenth day of September 1937.

(Signed) WAYNE H. FISHER

Signed

Witness

(Signed) E. T. McMAHAN

State of California

County of Los Angeles—ss.

I, Norma Berger, a Notary Public in and for the City and County of Los Angeles, State of California, residing therein, duly commissioned and sworn, do certify that on this 17th day of November, 1939, I carefully compared the foregoing copy of the Trust Agreement, dated September 9, 1937 and entered into between Elizabeth H. Fisher, of the County of Los Angeles, State of California, and Wayne H. Fisher, with the original thereof, now on file in the office of said Wayne H. Fisher.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, in the City and County of Los Angeles the day and year in this certificate first above written.

NORMA BERGER

Notary Public in and for the
City and County of Los Angeles,
State of California.

My Commission Expires Feb. 18, 1943

In the United States Circuit Court of Appeals for
the Ninth Circuit

BTA—Docket No. 98637

ELIZABETH H. FISHER, Petitioner

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR REVIEW OF DECISION OF
THE UNITED STATES BOARD OF TAX
APPEALS.

To the Honorable Judges of the United States Cir-
cuit Court of Appeals for the Ninth Circuit:

Comes now, Elizabeth H. Fisher, the petitioner
herein, by her attorney, F. T. Ritter, and respectfully
shows:

I.

Nature of the Controversy.

The respondent determined deficiencies in gift tax against the petitioner for the calendar years 1933, 1935 and 1937 in the aggregate sum of \$2,668.48. The deficiencies were based on two distinct and separable transactions of petitioner, and the deter- [47] minations of respondent in each matter were tried before the Board of Tax Appeals.

The first transaction was a gift by petitioner of life insurance policies in trust to her three adult children in the year 1933. The issue tried before the Board of Tax Appeals on this transaction related

solely to the valuation of these policies. The Board of Tax Appeals sustained the respondent in his valuation. Petitioner does not question the ruling of the Board of Tax Appeals in regard to this transaction, and does not ask a review thereof by the court.

The second transaction was a gift by petitioner of securities in trust to her six grandchildren in the year 1937. The trust provided in substance that the income thereof be distributed equally among the grandchildren until each reached the age of twenty-five years, at which time each donee took a prorata share of the corpus, if living, or, if deceased and without issue, such share went to the other donees. The issue tried before the Board of Tax Appeals related to the question of whether such gifts in trust to the donees were future interests in property or present interests in property, the gift tax to petitioner being less if the gifts were present interests in property.

The respondent argues, on the second transaction, among other contentions, that the trust provided for accumulation of the income by the trustee, and therefore the gift was a future interest in property. The petitioner contended the trust did not permit accumulation of income by the trustee, and that the [48] gift was a present interest in property. The Board of Tax Appeals found that the trust did not permit accumulation of income. Nevertheless, the Board of Tax Appeals held that the gift contained elements of both present and future interests in property, and decided that the right to receive the income cur-

rently was a present interest in property, while “the gifts of the remainder interests, that is, the corpus of the trust, were gifts of future interests”. The sole point on which petitioner appeals to the court is whether the Board of Tax Appeals applied the correct rule of law in its decision on the gift in the year 1937.

II.

Court in Which Review is Sought.

The United States Circuit Court of Appeals for the Ninth Circuit is the court in which review of said decision of the Board of Tax Appeals is sought, pursuant to the provisions of Section 1141 of the Internal Revenue Code.

III.

Venue.

The decision of the Board of Tax Appeals herein was rendered on or after February 18, 1942.

Petitioner is a citizen of the United States and has resided in the County of Los Angeles, State of California continuously for many years. She filed her Federal gift tax returns for the calendar years 1933, 1935 and 1937 with the [49] United States Collector of Internal Revenue for the Sixth Collection District of California; whose office is located at Los Angeles, California; and within the Ninth Judicial Circuit of the United States. The parties hereto have not stipulated that said decision may be re-

viewed by any court of appeals other than the one herein designated.

Wherefore, the petitioner prays that the decision of the Board of Tax Appeals herein, on the gift of petitioner in the year 1937, be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit, that a transcript of the record be prepared in accordance with law and the rules of said court and transmitted to the Clerk of said Court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said court.

Dated: April 27, 1942.

F. T. RITTER

100 East Ocean Avenue

Long Beach, California

Attorney for Petitioner.

[Endorsed]: Filed May 7, 1942 [50]

[Title of Circuit Court and Appeals and Cause.]

NOTICE OF FILING PETITION FOR
REVIEW

To Honorable Guy T. Helvering, Commissioner of Internal Revenue, and J. P. Wenchel, Esq., Chief Counsel, Bureau of Internal Revenue, his attorney:

You are hereby notified that the above named Petitioner on May 7th, 1942, filed with the Clerk of the United States Board of Tax Appeals at Washington,

D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision of said Board heretofore rendered in the above entitled cause; a copy of which petition for review is herewith served upon you.

Dated this 7th day of May, 1942.

(S) F. T. RITTER,
100 East Ocean Avenue
Long Beach, California
Attorney for Petitioner. [51]

Service of the above and foregoing notice, together with a copy of the petition for review therein mentioned, is hereby acknowledged, this 7th day of May, 1942.

J. P. WENCHEL
Chief Counsel, Bureau of Internal Revenue
Attorney for Respondent.

[Endorsed]: Filed May 8, 1942 [52]

United States Board of Tax Appeals
Washington

CERTIFICATE

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 55, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Prae-

cipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 2d day of June, 1942

[Seal] B. D. GAMBLE

Clerk, United States Board of
Tax Appeals.

[Endorsed]: No. 10171. United States Circuit Court of Appeals for the Ninth Circuit. Elizabeth H. Fisher, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of Record. Upon Petition to Review a Decision of the United States Board of Tax Appeals.

Filed June 19, 1942.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals for
the Ninth Circuit.

Case No. 10171

ELIZABETH H. FISHER, Petitioner

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

STIPULATION

It is hereby stipulated and agreed by and between

the attorneys for the respective parties hereto that the parts of the record on review designated by the attorney for the petitioner as necessary for consideration of the points on which the petitioner intends to rely, a copy of which designation is hereby attached, contain and constitute all of the evidence in this cause which is material to the said points.

Dated: June 30, 1942.

F. T. RITTER

100 East Ocean Ave.,

Long Beach, California

Attorney for Petitioner.

J. P. WENCHEL

Attorney for Respondent.

[Endorsed]: Filed Jul 7, 1942, Paul P. O'Brien,
Clerk.

[Title of Circuit Court and Appeals and Cause.]

PETITIONER'S STATEMENT OF POINTS TO
BE RELIED UPON AND DESIGNATION
OF PARTS OF RECORD TO BE PRINTED.

Petitioner hereby states the points on which she intends to rely upon in this petition for review are as follows:

1. The Board of Tax Appeals erred in concluding that any part of petitioner's irrevocable gifts of property in trust, in the year 1937 to her six named living grandchildren were gifts of future interests in property where under the terms of the trust each

donee beneficiary was entitled to the enjoyment of the current income of the property in trust until he reached the age of twenty-five years, and thereupon to receive his pro-rata share of the property in trust, if living, or if not living, but with issue, to have such property in trust distributed among his issue.

2. In the alternative The Board of Tax Appeals erred, after concluding that the rights of the donees to receive the current income from the property were present interests in property, in not valuing such present interests upon a period of the life expectancies of the six named living donees, since the donees would always receive such income if living, to-wit, from the trust until they attained the age of twenty-five, and directly from the property thereafter for the rest of their natural lives.

3. The Board of Tax Appeals erred in holding that there was a deficiency of gift tax due from petitioner for the year 1937 in the sum of \$2283.28, or any other sum, by reason of petitioner's gifts in the year 1937 being gifts of "remainder interests" or "future interests"

Petitioner hereby designates the parts of the record, as certified to the Clerk of the above entitled Court, as necessary for the consideration of the points as set forth above, as follows:

1. Docket entries of the proceedings before the Board.

2. Pleadings before the Board, consisting of:
 - (a). Petition of Elizabeth H. Fisher, No. 98637, filed May 20, 1939.
 - (b). Answer to petition.
 - (c). Amended answer, lodged April 15, 1941.
 - (d). Reply.
3. Findings of fact and opinion:
 - (a). Promulgated March 15, 1941.
 - (b). Promulgated December 9, 1941.
4. Decision entered on February 18, 1942.
5. Respondent's motion to vacate and set aside report, for rehearing, and for leave to file amended answer, filed April 15, 1941.
6. Order of Board of Tax Appeals restoring proceeding to general calendar, dated April 23, 1941.
7. Stipulation of facts, dated November 22, 1939, excluding items 1 and 9 thereof, both inclusive, and Exhibits A, B and C thereof, as being irrelevant to this review.
8. Trust agreement of September 9, 1937, referred to as Exhibit "D" in stipulation of November 22, 1939.
9. Petition for review filed by petitioner, Elizabeth H. Fisher, together with proof of service of notice of filing said petition for review and of service of a copy of same.

10. [This designation of contents of record on review with notice of filing and proof of service thereof.

F. T. RITTER

100 East Ocean Avenue,
Long Beach, California
Attorney for Petitioner.

[Endorsed]: Filed Jul 7, 1942.

